



IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
CIVIL CAUSE NUMBER 420 OF 2011
BETWEEN

MR D A BELLO

PLAINTIFF

-and-

NATIONS PUBLICATIONS LTD

DEFENDANT

CORAM : Z. J.V. NTABA, J. HON.
: Dr. M. Nkhata, Counsel for the Plaintiff
: Mr. P. Majamanda, Counsel for the Defendant
: Mr. D. Banda, Court Clerk and Interpreter
: Mrs. G. Chirombo, Court Reporter

JUDGMENT

1.0 THE CASE

- 1.1 This is a case commenced by writ of summons between the Plaintiff, Mr Dickson Alfred Bello and Nation Publications Ltd, the Defendant. The Plaintiff was seeking compensation for alleged defamatory material published by the Defendant in its Nation Newspaper of 5th October 2011. The published story alleged that the Plaintiff was an abuser of public funds. It continued to state that he misappropriated K100, 000.00 belonging to the Malawi Government. Further that he had refused to reimburse the money and was therefore a thief. The publication was a result of deliberations of the Public Accounts Committee of Parliament.
- 1.2 At trial, the Plaintiff, gave evidence as the first plaintiff's witness (PW1). His testimony was that he was currently working with the Malawi Institute of Education (MIE) since July, 2008 however before that he had been working at the Malawi Police Service (MPS) from 2003. He had been based at the Eastern Region Police in Zomba working as a Regional Accountant. In 2005, there was a sewer blockage

at the Police College Lines as well as two (2) police officers houses. The matter was discussed and it was agreed that Liwonde Town Assembly be contracted to fix the problem. The Assembly duly fixed the sewer problem and raised an invoice for payment whose work was certified by the MPS's construction and building officer. The payment was duly authorized by the committee of heads of department after which the Assembly was paid through a cheque. He accordingly adopted his witness statement entered it into evidence as **Exhibit PD 1**.

- 1.3 In 2010, the National Audit Office conducted an audit which flagged the above payment as an anomaly and which the Plaintiff enquired from MPS. The said report was produced and marked **Exhibit PD 2**. Further inquiries were sought by the Ministry of Home Affairs and were duly given, however the newspaper article was published on 5th October, 2011 with the original information which was marked **Exhibit PD 3**. Following this, the Ministry requested for comments as per the letters dated 5th April, 7th and 24th September, 2011, marked as **Exhibit PD 5**, **Exhibit PD 4** and **Exhibit PD 6**. Thereafter the Plaintiff contracted the Defendant's journalist who informed him to make a complaint and submit documentation of his innocence but on failing to get resolution he wrote them a letter through Messrs Barnet and James which was marked as **Exhibit PD 7**. In the letter, he argued that his reputation suffered serious damage after the publication of the story and his current job was affected.
- 1.4 Upon cross examination, he conceded that Public Accounts Committee (PAC) and Auditor General Reports dealing with Other Recurrent Transaction Funds are official documents. He also indicated that he did not doubt that the article emanated from the PAC reports. He also conceded that he did not make any attempts to have the reports changed because it was too late. Further that he had no opportunity to express his innocence at PAC.
- 1.5 PW 2 was Amon Henderson Kalitsilo who adopted his witness statement and which was tendered as **Exhibit PD 8**. He testified that he works as a Principal Accountant at Phentyre Rural Office of the Ministry of Education. It was his testimony that he was the Plaintiff's friend but following the publication of the newspaper story he enquired from the Plaintiff regarding its veracity. It was his submission that before the trial, he concluded that the Plaintiff's bottlestore at St. Mary's which he patronized was gained through illegal means. He concluded that their relationship soured and thereafter he stopped patronising the bottlestore. On cross examination, he indicated that he had not seen the Auditor General's Report nor the PAC one. It was his opinion that the reports portrayed the Plaintiff as a thief.
- 1.6 In terms of the law, the Plaintiff submitted that section 60 of the Constitution is the provision which provided that all official reports and publications of Parliament

shall be privileged. It was his argument that this was only related to the proceedings therein and not any other reports. It was his belief that this was limited to Gazettes and Hansards and newspaper reports. According to Robertson and Nicol in the 4th edition of Media Law at page 125, it argued that –

“Politicians may say whatever they choose in parliament or at the proceedings of the selected committees... in these, the absolute privilege attaches only to the maker of the statement: when it is reported or rebroadcast, the organisation that does so is protected by a privilege that is qualified and not absolute.”

- 1.7 He further stated that according to the 13th edition of Winfield and Jolowicz on Torts at page 138, it is indicated that -

“Fair and accurate reports of parliamentary proceedings are protected by qualified privilege. In order to qualify as fair and accurate, the report need not have to be a full précis of the debate: ‘a parliamentary sketch’ may properly select those portions of the debate which will be of interest to the public, what matters is whether that report is fair and accurate in so far as the debate concerned the plaintiff’s reputation.”

- 1.8 The Plaintiff argued that the concept of fair means that the report must present a summary of both sides of the case. In terms of accurate, the report should not contain any material inaccuracies as in **Cook v Alexander** [1974] Q.B. 279 where the Court of Appeal held that a newspaper report of the parliamentary proceedings was privileged as it was made fairly and honestly. Therefore reports of parliamentary proceedings are not protected by absolute privilege under the Constitution nor common law but may be protected under qualified privilege if it meets the above test.
- 1.9 However, if there is any malice, the courts cannot uphold privilege qualification. In **Halpin v Oxford Brookes University** [1995] QBENF 94/0863/C 227 where the Court of Appeal stated that malice could be proved if it could be shown that the writer knew that what he was publishing was untrue or was reckless as to whether it was accurate or not. The leading case on the test of malice with regard to media reports is **Reynolds v Times Newspapers** [1993] 3 WLR 1010 where the House of Lords held in considering this issue the court must look at seriousness of the allegation, the source of information, the steps taken by the publisher to verify the information, the urgency of the matter, whether comment was sought from the claimant, whether the article contained the claimant’s side of the story at least in general terms, the tone of the article and the circumstances of the publication including the timing.
- 1.10 The Plaintiff reminded the court that the duty to prove the occasion on which a statement was published is privileged lies with the maker of the statement.

Accordingly, they have to show evidence that it is qualified privilege which is covered by the law and done in good faith and without malice or improper motives. He contended that the Defendant's publication was not protected as the allegations by PAC were very serious as they labelled the Plaintiff as a thief and he was not invited to make a representation before them of his innocence or guilt. More so since he testified that the letters requesting his attendance arrived after the Defendant had already published its article.

- 1.11 He also argued that the fact that despite the matter being a legitimate public interest was not itself sufficient to trigger qualified privilege for purposes of defamation. He contended that there must be a duty on the publisher to publish the material in issue and a corresponding public interest to receive the information contained in the published material. Lastly, the fact that the Defendant believed that the occasion was privileged was not sufficient to make it so because such is a matter of law. Therefore, he prayed that the court enter judgment in his favour and the matter be submitted for assessment of damages.
- 1.12 The Defence's case was through its witness Edward Henderson Chitsulo who adopted his witness statement as **Exhibit DD 1**. He testified that he edited and passed the article '**Prosecute abusers of public funds**' published on 5th October, 2011. He indicated that the journalist who wrote was Mr. Kondwani Bell Munthali who based it on the Malawi Government Auditor General's Report for the Year Ended 30th June, 2010. Notably, page 44 was where the information regarding the Eastern Region Police Headquarters – Zomba, Section 69(c) titled: ORT funds withdrawn fraudulently: K100,000.00 was obtained. Incidentally at the hearing at Parliament on 4th October, 2011, Honourable John Adams, MP raised the query in terms of Mr Bello. He attached the said Parliamentary Report as **Exhibit DD 2**. The Committee was informed that the Plaintiff was informed of the hearing as per **Exhibit PD 5 and 6**.
- 1.13 On the matter the retraction as requested by the Plaintiff, Mr. Munthali is said to have informed him that he had no power to correct parliamentary proceedings because they were reported as they were presented in the Parliamentary House or any of its committees. He advised him to channel his complaint to PAC as it had power to dismiss the allegations.
- 1.14 During cross examination, he indicated that his paper has a readership 10,000 to 12,000 people. In terms of the published story, he stated that the onus to prove the truthfulness of the story was not on them but the Parliamentary Committee as they were merely reporting on things that took place at a meeting whose correctness was protected as absolute privilege. This was because they only published what was

discussed because they believed the veracity of facts, issues and matters uttered therein.

- 1.15 The Defendant raised the defence that the publication was covered by either absolute privilege or qualified privilege. Firstly, they dealt with the issue that the title of the journalist as news analyst was title or position of the author in terms of the Defendant's work place but it did not mean Mr. Munthali published an analysis of the PAC report as noted by the exhibited article which was a mere reproduction.
- 1.16 The Defendant argued that it is trite that it is excusable to publish a matter which may be both false and defamatory which is privileged. When the privilege is absolute it is a complete bar to an action and where it is qualified then it is a *prima facie* ground of defence. It also cited that section 60 of the Constitution as a provision which the court should apply in determining this issue. It was their contention that it was not disputed that PAC is a Parliamentary Committee under Standing Order No. 155(1)(a) and that it had a meeting on 4th October, 2011 which was the subject of the 5th October, 2011 newspaper article. As per Lord Denning in *Attorney General v Times Newspapers* [1973] 1 All ER 815 where he said –

"Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court."

- 1.17 It was their submission that the reproduction of the PAC meeting was still protected under absolute privilege because the Plaintiff did not deny that it was a reproduction of the Auditor General's report as discussed. Further the Plaintiff had conceded that these reports were public documents which could be accessed any time and anyone.
- 1.18 Alternatively, it argued that if the court did not apply the absolute privilege defence, then the court should consider that the defence was one of qualified privilege. Per *Grech v Ochams Press Limited* [1958] 2 Q.B 275 which held that the defence extends to a newspaper's right to make honest comment on apparently factual statements made in the debate that it has reported, even though these statements are later shown to be untrue. They also argued that the court should determine this issue by applying the test pronounced in the *Reynolds* case. It was their contention that this case met the criteria set out therein for instance the article came out soon after the PAC meeting and that it was not necessary to seek a comment from the claimant. More so because the Plaintiff's main arguments were that the article was published without him being consulted and that the source was the Auditor General's report as opposed to a PAC proceeding. They concluded that the newspaper article was a fair and accurate report as per law and was published without malice hence befitting to enjoy qualified privilege as such the claim should be dismissed with costs.

2.0 DETERMINATION OF THE CASE

- 2.1 The first issue for determination herein is if there was defamation. It is trite law that defamation, either libel or slander focuses on written or spoken words which likely tend to lower a person in the estimation of the right thinking or reasonable men or cause him to be shunned or avoided or expose him to hatred, contempt or ridicule. As to what constitutes defamation, Chatsika, J (as he then was) ably captured it in *Nyirenda v A R Osman and Company* [1993] 2 MLR 681 at 702 said -

"Defamation has been defined, in different terms, as the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which make them shun or avoid that person. It has also been defined as any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of society generally, to cut him off from society or expose him to hatred, contempt or ridicule."

- 2.2 In the case of *J.K. Khamisa v The Attorney General*, Civil Cause Number 565 of 1994 (HC)(PR)(Unrep) which laid down that -

"A defamatory statement or matter is one which has a tendency to injure the reputation of the person to whom it refers: Salmond and Heuston on the Law of Torts 19thEd. at page 155 cited with approval by Tambala, JA., in a Supreme Court of Appeal decision in PTC -v- Joyce Ng'oma, MSCA Civil Appeal No. 30 of 1996. The essential feature of defamatory matter is, therefore, its tendency to damage the reputation or good name of the plaintiff, Tambala, JA, further stated in that case. It is therefore not what the plaintiff feels about himself upon defamatory matter. There has to be a publication of the defamatory matter to some person other than to the plaintiff. And what matters is the effect of the defamatory matter on that other person, in particular as to whether that matter in that person tends to injure the reputation of the person to whom it relates"

- 2.3 The *Khamisa* case dealt with the unpacking of plaintiff's luggage on suspicion that he had stolen property belonging to the Office of the Malawi High Commissioner to Kenya after expiration of his contract in the presence of some other people amounted to defamation. It is therefore pertinent that a claimant show that there was publication to a third party of defamatory statements, written or oral, to a person other than the claimant and that the publication of the words complained of was about and that they concerned the complainant. Mere abuses directly made to and against the complainant would not suffice. The Plaintiff's claim in defamation was in relation to the Defendant's newspaper article of 5th October, 2010 titled '**Prosecute abusers of public funds**' which he argued amounted to defamation. For all intents and purpose, the above publication can be deemed to be defamatory as they fit the criteria set above.
- 2.4 The Defendant however indicated that the above story was a replication of a parliamentary proceedings as such protected under absolute privilege. In terms of publications which are protected by absolute privilege. Section 60 (2) of the

Constitution of Malawi providing for all official reports and publications of parliament offers insight -

All official reports and publications of Parliament or of its proceedings or of the proceedings of any committee of the Parliament shall be privileged and utterances made in the Parliament or in any committee thereof wherever published shall be protected by absolute privilege.

- 2.5 The concept of absolute privilege is that it acts as a complete defence to defamation. Notably, the law has restricted in terms of where absolute privilege applies. The defence shall be allowed in terms cases involving statements made during judicial proceedings, debates, proceedings or reports of Parliament or lawyer and client communication. In the case of *Mann v O'Neill* [1997] HCA 28 (31 July 1997) 212 where a majority of the High Court of Australia stated that absolute privilege attaches to statements made in the course of parliamentary proceedings for reasons of inherent necessity or, as to judicial proceedings, as an indispensable attribute of the judicial process.
- 2.6 It can be argued that the law of defamation must strike a balance between the freedom of speech or press against the protection of a person's reputation. The Malawian Constitution does protect freedom of the press as provided under section 36. Notably, the Defendant has not claimed this right but it is worth noting that its existence as a newspaper is to report news as guaranteed by the above provision. Therefore, where it has been sued for publishing news, it has rights to invoke the said provision as well as other applicable defences as was the case herein.
- 2.7 Consequently when the defence of absolute privilege fails, a defence of qualified privilege can be allowed. In *Adam v Ward* [1917] AC 309, the court stated that a privilege occasion is, in reference to qualified privilege, an occasion where the person who makes it has an interest or a duty to make it to the person to whom it is made and the person to whom it is made has a corresponding duty to receive it. This entails that the person making the statement had a legal, social, moral or public right to do so. Previously, qualified privilege did not apply to the media, for instance in the case of *Davis and Sons v Shepstone* (1886) 11 AC 187 held that the privilege of reports of proceedings in Parliament does not extend to reports of statements by newspapers.
- 2.8 The courts in determining a defamation especially where a defence is proffered, must still examine the circumstances, for instance in *Blackshaw v Lord* [1983] 2 All ER 311, the court pointed out that where damaging allegations or charges have been made and are still under investigation, or have been authoritatively refuted, there can be no duty to report them to the public. Further, courts must rule whether the alleged defamatory material was done with intention like improper motives or malice. According to the case of *Hollocks v Lowe* [1975] AC 135 which held that if the defendant did not believe the publication to be true, it is usually conclusive evidence of malice and it rebuts the defence of qualified privilege. Incidentally one cannot argued that the motive for publication is irrelevant however if the meaning which can

be derived from the material is determined to be truth, then the court may rule against defamation.

- 2.9 Notably, the Plaintiff and Defendant have both indicated that the leading case of *Reynolds* has set the test especially for establishing malice. Like *Halpin v Oxford Brookes University* [1995] QBENF 94/0863/C 227 stated that malice can be proved if shown that the writer knew that what he was publishing was untrue or was reckless to whether it was accurate or not. Notably, when it comes to the media, the same principles on whether the material they publish is defamatory has to be subjected to the same standards. However courts have tended to examine media cases carefully. For instance the Malawian case of *Mpasu v The Democrat*, Civil Cause Number 124 of 1995 (HC)(PR)(Unrep) stated that newspapers have a duty to inform the public and that the public has a corresponding duty to receive the information.
- 2.10 As already noted in the *Times Newspapers* case which held that comments made in Parliament can be repeated in newspapers without any fear of an action for libel or proceedings for contempt of court. The case of *GKR Karate v Yorkshire Post* (2000) 2 All ER 931 in upholding a report by a journalist stated that the public had to be warned quickly for its own protection and ruled against defamation.
- 2.11 In the case herein, this court is basically being called to answer the duty and interest test that is whether the media had a duty to publish the information and whether the public had an interest in receiving it. As argued by the Defendant, it merely printed the proceedings of the PAC meeting held on 4th October, 2011. It did as a matter of public interest. Nations Publications Limited published as indicated by DW 1 what it reasonably believed in its role as a public informer and that publishing the statement complained of was in the public interest. It also strongly believed in the correctness of the information as it came from an Auditor General Report and tabled at a PAC meeting. Accordingly, this court agrees with the Defendant in terms that it had no malice when it published the 5th October, 2011 article as all it reported was what had transpired at Parliament.
- 2.12 In conclusion, the publication of made by Nation newspaper was not covered by absolute privilege as such refers to official publications of Parliament and this does not extend to publications made by newspapers (my emphasis). However, the publication can be covered by qualified privilege because, newspapers have a duty of informing the public and the public has a corresponding duty to receive such information of issues of national interest.

3.0 CONCLUSION


- 3.1 The Plaintiff's allegation for defamation should fail because the circumstances surrounding the publication are properly fitting the requirements in terms of qualified privilege.

3.2 This court holds that the publication did not accuse the Plaintiff as it merely reproduced what was already produced by the Public Accounts Committee.

3.3 Each party shall bear its own costs.

I order accordingly.

Dated this 13th day of February, 2017 at Zomba.


Z.J.V Ntaba
JUDGE